No. 84-68

In The

Supreme Court of the United States

October Term, 1984

KERR-McGEE CORPORATION,

Petitioner,

versus

THE NAVAJO TRIBE OF INDIANS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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August 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

26pp

QUESTION PRESENTED

Are the tax laws of the Navajo Tribe of Indians rendered ineffective because the Secretary of the Interior has not acted affirmatively to approve them, where Congress has imposed no requirement of Secretarial approval, and the Secretary, on submission of the laws, determines that they do not require his approval?

PARTIES

Pursuant to Rule 40.3 of this Court, the persons listed by Petitioner as the director and members of the Navajo Tax Commission are substituted for as respondents herein by their successors, Lawrence White (director), Susan Williams, Stella Saunders, and Nelson Gorman (members).

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STATEMENT OF THE CASE

The Navajo Tribe of Indians is the largest federally-recognized Indian Tribe. It occupies an area of approxi-

mately 25,000 square miles (roughly the size of West Virginia), located within the States of Arizona, New Mexico, and Utah. The vast majority of this land is held in trust for the Tribe by the United States. The Navajo population of the reservation and environs is about 161,000.

The governing body of the Navajo Tribe is the Tribal Council, an 87-member body popularly elected every four years. The Tribal Council has existed in some form since the 1920's, and in much its present form since 1938. Out of the 161,000 population (close to half of which are minors), there are about 79,000 registered tribal voters, and of these 69% voted in the tribal general election of 1982.

Governmental programs operated by the Tribe include a police force, a system of courts, natural resources management and protection agencies, a labor relations agency, health and social welfare programs, and a system of public transportation. Governmental operations are financed in large part from the Tribe's general fund.

In 1978 the Tribal Council enacted two tax laws, the Possessory Interest Tax and the Business Activity Tax. The Possessory Interest Tax, 24 Navajo Tribal Code §201 *et seq.*, is based on the value of leasehold interests in tribal land. The tax rate has been set since 1978 at 3%. 24 N.T.C. §201. Possessory interests worth less than $100,000 are not taxed. 24 N.T.C. §206.

The Business Activity Tax, 24 N.T.C. §401 *et seq.*, is measured by receipts from the sale of personal property produced or extracted within the Navajo Nation, or from

the sale of services within the Navajo Nation. Property produced within the Navajo Nation and then removed before sale is valued as of the time it leaves the jurisdiction. 24 N.T.C. §403(2). There are various exemptions and deductions, including a standard deduction of $125,000 per calendar quarter. 24 N.T.C. §§405-406. The tax rate has been set since 1978 at 5%. 24 N.T.C. §401.

These two laws, like other Tribal Council resolutions, were submitted to the Bureau of Indian Affairs after passage, in order that they might be classified as to whether they required federal approval, and, if so, further acted upon. The Office of the Solicitor for the Department of the Interior reviewed the Possessory Interest Tax (the first passed), and expressly determined that it did not "purport to take any . . . action, which, under federal statute or regulation or under tribal law, is subject to Secretarial approval or disapproval." (Memorandum of May 4, 1978; Navajo Excerpt of Record on appeal at 148.) Both taxes were thereafter classified by the Department of the Interior as not requiring Secretarial approval. The Secretary has neither approved, disapproved, nor otherwise acted on either law, and has maintained the position in this and other litigation that the taxes do not require his approval in order to be valid.

Shortly after the enactment of these taxes, their validity was challenged in suits commenced against the Tribe in the federal district courts for Arizona, Utah and New Mexico. In 1980, after the Tenth Circuit upheld the taxing power of the Jicarilla Apache Tribe in *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, *aff'd* 455 U.S. 130,

petitioner Kerr-McGee Corporation amended its complaint herein to add the United States as a party defendant, and to allege for the first time that the Navajo taxes were invalid because they required Secretarial approval. (The United States was never thereafter served with process, but participated as *amicus curiae* in the instant case, and as a party defendant in the parallel cases in Utah.)

In June 1982, the federal district court in Utah ruled in *Southland Royalty Co. v. Navajo Tribe,* No. 79-0140, and consolidated cases, that the tribal taxes required Secretarial approval to be effective (although they were otherwise found lawful). The district court in Arizona then reached the same decision in the instant case, relying on the *Southland* decision, which it held to have the effect of collaterally estopping the Tribe. Appeals and cross-appeals were taken to the Ninth and Tenth Circuits. On August 22, 1983, the Tenth Circuit reversed the district court's holding that the taxes required Secretarial approval, thereby upholding the validity of the taxes. *Southland Royalty Company v. Navajo Tribe,* 715 F.2d 486, *petition for rehearing pending.* On April 17, 1984, the Ninth Circuit did the same. It is this latter decision that petitioner seeks to have reviewed by this Court. The Navajo Tribe opposes that petition for the reasons set forth below.

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REASONS WHY THE WRIT SHOULD BE DENIED

I. The Decision Below Follows Directly From The Decision Of This Court In Merrion v. Jicarilla Apache Tribe.

In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), this Court left no doubt as to the power of Indian tribes to enforce taxes, within their territorial jurisdiction, as an element of their inherent sovereignty. Since the decision of the Tenth Circuit in *Merrion,* Petitioner and others have been attempting to carve an exception from the rule of that case in order to invalidate the tax laws of the Navajo Tribe. Although Petitioner claims to find this exception in the *Merrion* case itself, the principles enunciated by this Court in *Merrion* in fact defeat Petitioner's arguments and lead ineluctably to the conclusion that the Navajo taxes constitute a legitimate exercise of the Tribe's sovereignty.

Two principles are made very clear in the *Merrion* decision. One is that tribal taxing power is an "inherent power necessary to tribal self-government and territorial management," 455 U.S. at 141, and that as such it derives from a tribe's inherent sovereignty and *not* from any federal grant of power (whether by means of a federally-approved tribal constitution or otherwise). 455 U.S. at 149, n.14; 159. The other is that the taxing power, as an inherent attribute of sovereignty, remains intact unless divested by the federal government, and that this Court will not find divestiture of taxing power in the absence of "clear indications" that Congress intended such a result. 455 U.S. at 149 & n.14, 152, 159.

The foregoing principles suffice to dispose of Petitioner's arguments. This Court has previously recognized the sovereign powers of the Navajo Tribe. *United States*

v. Wheeler, 435 U.S. 313 (1978); *Williams v. Lee*, 358 U.S. 217 (1959).[1] The Navajo Tribe retains its taxing power,

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[1]*Amici curiae* Arizona Public Service Company ("APS") and Southern California Edison Company take an even more extreme position than Petitioner, claiming in their joint brief that the Navajo Tribal Council is not the government of the Tribe at all, but merely "an agency created . . . for the administrative convenience of the Department of the Interior." APS Brief at 16. The 55,000 Navajos who voted in the last tribal election would no doubt be taken aback by the claim that "the Ninth Circuit has taken it upon itself to appoint the Navajo Tribal Council as the tribal government by judicial fiat." *Id.* at 16. The underlying assumption of this argument, which would delegitimize the governments of any number of nations including England, and which, unsurprisingly, APS supports with no authority, is that a people (even one whose native language is unwritten) may establish a government only by means of a written constitution. The language of the IRA itself is to the contrary. See n. 2, *infra*.

The claim is in any case outside the scope of this litigation. It was not addressed by the Ninth Circuit because Kerr-McGee has never made the argument herein, and in fact alleged in its First Amended Complaint (the last), at ¶ 4, that the Navajo Tax Commission "is an agency of the Tribe created by the Tribal Council, which is the governing body of the Tribe." Although a claim similar to that now made by APS was argued in the District Court in Utah in the parallel *Southland* litigation, it was rejected on the grounds that "Although initially the Tribal Council was the creation of the Interior Department rather than the tribe, it is universally recognized as the existing, legally constituted governing body of the tribe, acting with all of the sovereignty of the tribe." Appendix to Petition for Writ of Certiorari, at C-13.

This is the only conceivable result. In *United States v. Wheeler*, 435 U.S. 313 (1978), this Court held that the Navajo Tribe, in enforcing the provisions of the Tribal Code through the tribal courts, exercises its separate and inherent sovereignty, and not that of the United States. Significantly, both the tribal courts and the Code were recognized by this Court to have been created by the Navajo Tribal Council. 435 U.S. at 327 & n.25. Rejecting the argument, now made by APS, that

(Continued on next page)

as a necessary aspect of such sovereignty, in the absence of clear federal divestiture, which has not occurred. It runs counter to the whole notion of tribal self-government to argue that because the Jicarilla Tribe has a constitution which required Secretarial approval of its tax laws, every other tribe must follow identical procedures.

Petitioner's arguments contort the Indian Reorganization Act ("IRA"), 25 U.S.C. §§461-479, and the Navajo-Hopi Indian Rehabilitation Act, 25 U.S.C. §636, both of which were plainly intended to allow Indian tribes a range of choices as to the organization of their governments,

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the Navajo government is no more than an arm of the federal government, this Court said, "That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power." 435 U.S. at 328. The same is true as to the Interior Department, which while promulgating the original regulations as to the composition and selection of the Tribal Council, has never purported to dictate or even to enumerate its powers.

Both Congress and the Executive Branch have long recognized the Navajo Tribal Council as the government of the Navajo Tribe. "Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts." *Williams v. Lee*, 358 U.S. 217, 221 (1959). The Navajo and Hopi Indian Rehabilitation Act itself manifests Congressional recognition of the Tribal Council. 25 U.S.C. §§ 635(b), 636, 637, 638. *See* 16 U.S.C. § 445; Pub. L. 93-351, Act of Dec. 22, 1974, 88 Stat. 712; Pub. L. 83-493, Act of October 27, 1974, 88 Stat. 1486; Pub. L. 86-636, Act of July 12, 1960, 74 Stat. 470; Pub. L. 85-868, Act of Sept. 2, 1958, 72 Stat. 1686-1690; Pub. L. 85-547, Act of July 22, 1958, 72 Stat. 402; Pub. L. 84-276, Act of Aug. 9, 1955, 70 Stat. 522; S. Rep. 93-1177 on H.R. 10337; Rev. Proc. 83-87, Dec. 12, 1983, 1983-50 I.R.B. 8. *See also Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied* 372 U.S. 908 (1963); Robert W. Young, *The Navajo Yearbook*, at 392 (1961). For codification of laws concerning the Tribal Council, see 2 N.T.C. § 101 *et seq.*; Navajo Election Law of 1966, 11 N.T.C. § 1 *et seq.*

rather than to compel any particular result.[2] Both acts make the adoption of a constitution entirely optional, and both acknowledge the existing powers of Indian Tribes by providing that tribal constitutions might vest in the tribes adopting them certain powers *in addition to* those already vested in them by existing law. 25 U.S.C. §§476, 636; *see United States v. Wheeler,* 435 U.S. 313, 328 (1978). *Merrion* stands for the proposition that one of those powers

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[2]The IRA does not even equate organization with the adoption of a constitution, as Petitioner suggests; it provides that Indian tribes *shall* have the right to organize and *may* adopt constitutions and by-laws. 25 U.S.C. § 476. It also flatly provides that the Act "shall not apply" on reservations where its application is voted down. 25 U.S.C. § 478.

Legislative history further bears out that there was no intention to force tribes into any particular course. The sponsor of the IRA and others repeatedly stated that nothing in it permitted that BIA to impose its will upon any Indians, and that its provisions were entirely optional. 78 Cong.Rec. 11123-11124, 12164 (June 1934). (Arizona Public Service Company relies in its *amicus curiae* brief on comments which Commissioner Collier made to the Navajo Tribal Council concerning the bill then pending in Congress. APS Brief at 8 *et seq.* What APS does not say is that due to tremendous opposition to the BIA-drafted bill originally presented by Commissioner Collier, the IRA was extensively redrafted before passage, specifically so as to make its provisions permissive instead of mandatory. *Id.* at 11123-5, 12164. While Commissioner Collier, in order to obtain support for the IRA, painted for the Navajos a picture of tribes "at the mercy of the Secretary", no matter how "arbitrary" or "devilish" his whims, APS Brief at 8, it cannot seriously be contended that that is the law today, and the wording as well as the legislative history of the IRA indicates that Congress did not accept it to be the law then.) As for the Navajo and Hopi Indian Rehabilitation Act, the Secretary of the Interior noted when transmitting the bill to Congress that the provision relating to a constitution for the Navajo Tribe "has been revised in order to accord the Navajos the widest practicable choice in determining the framework of their tribal government." H.R.Rep. 81-1474.

which pre-existed the IRA, as opposed to having been created by tribal constitutions, *is* the taxing power. *See also Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 153 (1980); Powers of Indian Tribes, 55 I.D. 14, 46 (1934).

There is simply nothing in these laws or any other legislation which would accomplish the result Petitioner argues for—that Congress has limited the taxing power of tribes without constitutions, or that all tribal tax laws require Secretarial approval, even in the absence of constitutional provisions to that effect. Contrary to Petitioner's suggestion, the Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g, does not so much as hint at such a meaning. Far from indicating some Congressional intention to generate distinctions between tribes with constitutions and those without, the Act applies generally to "unallotted lands within any Indian reservation or reservations," permitting them to be leased for ten years and as long thereafter as minerals are produced in paying quantities, by authority of "the tribal council or other authorized spokesman for such Indians," and with the approval of the Secretary. 25 U.S.C. §396a.

Petitioner's arguments notwithstanding, the proviso in the Mineral Leasing Act (§396) does not distinguish tribes which have simply organized under the IRA from other tribes. Tribes which have both organized *and* incorporated under the IRA (which are separate matters) are distinguished only to the extent that it is provided that the auction requirements of 25 U.S.C. §396b shall not restrict their rights to lease their land as permitted under the IRA. This is a reference to the fact that under 25

U.S.C. §477, tribal corporations may be empowered to lease lands independent of the Secretary for a period not to exceed ten years (not, however, for the longer period of most mineral leases).

The very specificity of this provision belies Petitioner's arguments that Congress intended to create additional distinctions between tribes with and without constitutions, limiting the taxing power of the latter. Indeed, there is nothing whatever about taxes in the Mineral Leasing Act. Petitioner suggests that by explicitly requiring the Secretary to approve the terms of tribal mineral leases, Congress has implicitly required approval of any tribal laws bearing on the lessees. This argument reflects the very confusion of proprietary and sovereign matters which this Court rejected in *Merrion*, and attempts to turn a law obviously intended to protect Indian tribes into an unwarranted limitation on their powers. In *Merrion* this Court held that a law specifically authorizing state taxation, 25 U.S.C. §398a-398c, did not thereby limit tribal taxing power; *a fortiori* the 1938 Act, which does not even mention taxes, does not do so. 455 U.S. at 150-151.

Petitioner's analysis of the *Merrion* decision depends entirely on the reading of isolated passages out of context. The passage about "federal checkpoints," 455 U.S. at 155, is part of this Court's analysis of the Commerce Clause issue in *Merrion*. The existence of such checkpoints for the tax at issue there was relevant because it obviated the need for additional analysis by the Court under the dormant Commerce Clause. *Id.* The absence of federal checkpoints might have altered the Commerce Clause analysis (although this Court went on to hold that the

tax at issue would not infringe the dormant Commerce Clause in any case), but that is entirely different from the proposition that, independent of any Commerce Clause question, a tribal tax must pass through federal checkpoints to be valid. As for the statement that the amendment of the tribal constitution was necessary to effectuate the Jicarilla tax, that can hardly have been intended to suggest such a requirement for all tribes; even among those tribes which *have* constitutions, it is obvious that an amendment is not necessarily required in order to permit taxation.

Finally, the mere mention that the constraints inherent in Secretarial approval and federal ability to take away tribal taxing power "minimize potential concerns" about unprincipled tribal taxes cannot reasonably be read as signifying a judicially-created requirement for Secretarial approval. The Navajo taxing power too is constrained in that it may be divested by Congress, but Petitioner's interpretation of this remark—that whether Congress acts or not, every exercise of tribal taxing power is automatically conditioned on Secretarial approval—is wholly at odds with the statement immediately preceding, that tribal authority to tax is an "inherent power." 455 U.S. at 141.

The result Petitioner argues for would, moreover, constitute an extraordinary instance of judicial legislation. As the Ninth Circuit noted in its decision of this case, even a tribe which has a constitution does not necessarily require Secretarial approval of tax laws; this is something that varies from one tribe to the next, and is answerable by reference to the tribal constitution itself. (This Court for example specifically recognized in *Santa Clara Pueblo v.*

Martinez, 436 U.S. 49, 66 [1978], that there are tribal constitutions which do not require Secretarial approval of ordinances.) Onto this system Petitioner would engraft a new, judicially-created category, wherein Secretarial approval of ordinances is required notwithstanding the lack of any express requirement therefor in federal or tribal law. Petitioner's analysis suggests no principled method for determining exactly what tribal laws would fall into this new category. The Ninth Circuit was entirely correct in rejecting a result which would not only result in enormous confusion, but would conflict head-on with the right of Indian tribes to select their own form of government and to exercise their sovereign powers, subject only to divestiture by Congress.

II. The Decision Of The Ninth Circuit Is In Accord With The Decisions Of The Tenth Circuit And Other Federal Courts; There Is No Conflict For This Court To Resolve.

There have been a number of cases raising virtually the same question decided by the Ninth Circuit in the instant case. The outcome of all of these has been to uphold the validity of the tribal laws challenged.

Most directly on point, of course, is the decision of the Tenth Circuit in *Southland Royalty Company v. Navajo Indian Tribe*, 715 F.2d 486 (1983), *petition for rehearing pending*. The taxes at issue there were the same Navajo taxes challenged here. The Tenth Circuit, like the Ninth, found the taxes valid without Secretarial approval, and without the adoption of a constitution by the Navajo Tribe. Among the statements from *Southland* which the Ninth Circuit quoted with approval in its decision herein is that "One of the ways in which the IRA reflects a respect for

self-government is in the provision that makes adoption of a constitution optional." 715 F.2d at 489. For this and other reasons, the Tenth Circuit rejected the argument that when this Court in *Merrion* found the Mineral Leasing Act of 1938 not to pre-empt tribal taxing power, that holding was limited to tribes with constitutions. The Court of Appeals in *Southland* also noted that when Congress recognized tribal taxation in the Natural Gas Policy Act of 1978, 15 U.S.C. §3320 (which recognition was relied on by this Court in *Merrion*), it in no way distinguished between tribes with and without constitutions. *Id.*

A case dealing with these same issues in the context of the tax laws of another tribe is *Conoco v. Shoshone and Arapahoe Tribes*, 569 F.Supp. 801 (D. Mont. 1983), *appeal pending*. There again it was argued that the holding of *Merrion* was inapplicable to the Shoshone and Arapahoe Tribes because they did not have an IRA constitution and had not had their taxes approved by the Secretary. The court rejected this argument in a detailed analysis. (It is worth noting that although this decision was released nine days after that of the Tenth Circuit in *Southland*, the court in its opinion indicated that it had reached its result before the Court of Appeals ruling issued. 569 F.Supp. at 804.) The court found that Congressional power to divest tribes of their taxing authority, the Indian Civil Rights Act (25 U.S.C. §1301), and economic and political restraints constituted adequate protection from arbitrary and confiscatory taxation. 569 F.Supp. at 806. It also rejected the argument that its holding suggested there was no good reason for a tribe to reorganize under the IRA, by pointing out that there were other benefits, not how-

ever related to taxing power, which were available to tribes which did so. *Id.* at 807.[3]

Another case on point is *Babbitt Ford v. Navajo Indian Tribe,* 710 F.2d 587 (9th Cir. 1983), *cert. denied* 52 U.S.L.W. 3720 (1984). Although the *Babbitt Ford* case did not involve tax laws, in it the argument was again made —and again rejected—that the Navajo Tribe could enforce its civil laws as to non-Indians only if it adopted a constitution and had those laws approved by the Secretary. 710 F.2d at 598-599. Similarly, in *Knight v. Shoshone and Arapahoe Indian Tribes,* 670 F.2d 900 (10th Cir. 1982), the court upheld the application to non-Indians of a tribal zoning ordinance which had not been approved by the Secretary, on the grounds that there, as here, "The executive branch expressly advised the Tribes that the ordinance could be enacted without BIA approval." 670 F.2d at 903.

The various courts which have considered the arguments made by Petitioner herein have rejected them. These arguments do not merit review by this Court.

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[3]The arguments of Petitioner and *amici curiae* that, if the Navajo Tribe may tax without secretarial approval, other tribes which organized under the IRA must have been "duped" into surrendering their powers, again ignores the fact that adopting a constitution does not necessarily mean conditioning the effectiveness of tribal laws on Secretarial approval. *See* discussion at pp. 11-12, *supra*. Whether Secretarial approval is required turns not on whether a tribe adopts a constitution, but on the specific provisions of the constitution or of other applicable tribal or federal law. Moreover, for a given tribe whose government was in disarray because of the federal allotment policy repudiated in the IRA, or where there were disputes as to who governed the tribe, a constitution was no doubt an extremely useful tool—though not necessarily the only one—for resolving the confusion and starting the tribe out on a new foot. It does not however follow that a governing body could not evolve without a written constitution, as did the Navajo Tribal Council.

III. There Are No "Serious And Recurring Problems" Raised By The Decision Below.

Petitioner and the various *amici curiae* greatly exaggerate what is at issue in this case, raising the specter of Indian tribes completely out of control of the federal government. It bears emphasis that this is not a case of Secretarial *disapproval* of an ordinance, and that the Navajo Tribe has in no way attempted to circumvent any authority delegated to the Secretary. The Tribe submitted its tax laws to the Secretary, and the Secretary determined them not to require his action. It is difficult in the extreme to see why that determination should deprive the Navajo Tribe of its taxing power.

It is of some interest that in January of 1983 the Assistant Secretary for Indian Affairs issued "Guidelines for the Review of Tribal Ordinances Imposing Taxes on Mineral Activities." Consistent with the position of the Interior Department in this litigation, the guidelines apply, by their terms, only "where Secretarial review or approval is expressly required under federal law, the constitution of the tribe, the ordinance itself, or other tribal law." Guidelines, §1.1B. The procedures set out in the guidelines are therefore inapplicable to the Navajo tax laws, and in any case the Navajo taxes, like the Jicarilla Apaches', were enacted before the guidelines issued. But it may be noted that the only *substantive* reasons for which taxes subject to review may be disapproved by the Secretary under the guidelines are violations of federal or tribal law, or failure to provide a procedure "by which a taxpayer may contest his or her tax liability, and be afforded a right to a hearing before a tribal forum other than the body which enacted the tax." Guidelines §1.6B(3)-(4).

Protracted litigation in two federal circuits has not shown the Navajo taxes to violate any law, and the tax laws do provide an appeal procedure of the type required. 24 N.T.C. §§220, 427. And while lack of taxing power in the tribe's governing body is also grounds for disapproval, the guidelines provide that "Unless their powers are specifically limited by the tribal documents which established them, the governing bodies of tribes without written constitutions will be considered to possess the authority to exercise the inherent power of the tribe to tax." Guidelines, §1.6B(2)(b). With the Navajo taxes already in harmony with the substantive guidance the Secretary has provid d, Petitioner's insistence on the urgent need for this Court to require Secretarial review rings especially hollow.

The crucial factor ignored by Petitioner and the *amici curiae,* when they claim that the Ninth Circuit has placed the Navajo Tribe beyond federal control, is the plenary power of Congress over Indian tribes. Congress has ample power to deal with any threats which particular tribal taxes may pose to national interests. By the same token, "a proper respect for the plenary authority of Congress in this area" cautions that the courts themselves "tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 60 (1980).

To date, forty-eight years after the deadline for tribes to vote whether to come within the application of the IRA, Congress has not seen fit to limit the exercise of tribal sovereignty in the manner sought by Petitioner. It did in 1968 enact the Indian Civil Rights Act, 25 U.S.C. §1301,

which provides individuals with much the same protections against Indian tribes as the Bill of Rights ensures against the states and the federal government. Congress thus ensured that all Indian tribes, regardless of whether they do or do not have constitutions and regardless of what those constitutions may provide, are subject to enumerated constraints in their dealings with persons under their jurisdiction. Congress apparently saw no need to go any further in limiting the powers of tribes without constitutions, whether by removing certain powers from them or requiring that all their laws be approved by the Secretary of the Interior.

Contrary to Petitioner's assertion that the protections of the Indian Civil Rights Act are "incapable of enforcement," this Court held in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), that the Act "modifies the substantive law" applicable to Indian tribes, and that claims for violation of the Act may be heard in tribal courts. This route has not been attempted by any of those challenging the tribal taxes in federal court, and any complaints about the Indian Civil Rights Act being unenforceable are therefore unfounded.[4] (Claims that the Navajo taxes violate

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[4]Also ungrounded are complaints about sanctions for failure to comply with certain requirements of the tax laws—none of which have been imposed on Petitioner or anyone else. With respect to the loss of rights to engage in productive activity, it may however be noted that the availability of such a sanction is in accordance both with the practice of states which enjoin delinquent taxpayers from continuing in business (see e.g. New Mexico Statutes [1978 compilation] § 7-1-53, Arizona Revised Statutes § 42-1334), and with the holding of this Court in *Merrion,* 455 U.S. at 144-145, that Indian tribes retain the pow-

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the Indian Civil Rights Act were in any case considered by the district court in *Southland;* the court found no cause of action stated even assuming it had jurisdiction. Appendix to Petition for Writ of Certiorari at C-9, C-10.) Furthermore, contrary to assertions that only Indians can participate in tribal government, Petitioner and a number of the *amici curiae* have commented on regulations proposed by the Navajo Tax Commission, in writing or at hearings before the Commission. There is in fact nothing to prevent these companies from advocating their views with tribal lawmakers in the same way as they do with respect to other governments. The lack of suffrage can be no impediment, as corporations are no more able to vote in state or federal elections than in tribal ones.

The many cases which Petitioner cites to show "serious and recurring problems" in fact demonstrate the opposite; they are all in harmony in upholding the civil jurisdiction of Indian tribes, in accordance with the decisions of this Court in *Merrion* and other cases. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). The decision of the Ninth Circuit herein simply does the same.

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er to exclude from their jurisdiction those who do not comply with conditions on their presence. The Tribe notes as well that for an Indian tribe to impose only civil sanctions on the commission, by a non-Indian, of an act which is punishable as a crime when committed by an Indian, is no more than what the tribe is required to do by the holding of this Court in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978).

CONCLUSION

The issues raised by Petitioner are all settled ones. There is nothing in the decision of the Ninth Circuit which warrants review by this Court.

Respectfully submitted,

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